MOTION FILED
JUL 1 1983

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

Kim Jerome Gottschalk*
Richard B. Collins
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae

*Counsel of Record

July 1983

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE..... ix

QUESTIONS PRESENTED..... 1

INTEREST OF AMICUS..... 2

STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 10

ARGUMENT..... 10

I. FEDERAL LAW DOES NOT AUTHORIZE OR REQUIRE NORTH DAKOTA TO DENY ITS COURTS JURISDICTION OVER CIVIL ACTIONS ARISING IN INDIAN COUNTRY BY INDIANS OR TRIBES AGAINST NON-INDIAN RESIDENTS OF THE STATE..... 10

A. The Decision Below Was Based on Federal Law..... 11

B. This Court's Decisions on Indian Country Jurisdiction Do Not Support The Decision Below..... 17

C. Public Law 280 Does Not Support The Decision Below..25

D. The State's Statute Did Not Comply With P.L. 280.. 33

1. By Its Terms, Public Law 280 Is Confined to Assumption of State Jurisdiction; It Does Not Authorize Withdrawal of Pre-Existing Jurisdiction..... 25

2. The Legislative History and This Court's Decisions Show That Public Law 280 Was Concerned Only with the Assumption of Jurisdiction, Not with Withdrawal of Pre-Existing Jurisdiction..... 29

II. NORTH DAKOTA'S DENIAL OF JURISDICTION OVER THIS ACTION VIOLATES 42 U.S.C. § 1981 AND THE FOURTEENTH AMENDMENT..... 40

A. The State's Action Violates 42 U.S.C. § 1981..... 40

B. The State's Action Violates the Fourteenth Amendment..... 41

1. North Dakota's Rule Denies Indians and Tribes Equal Protection..... 41

2. North Dakota's Rule Denies Indians and Tribes Due Process of Law 45

CONCLUSION 46

TABLE OF AUTHORITIES

CASES	PAGE(s)
Alaska Chapter Associated General Contr. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).....	41
Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 (1978).....	44
Boddie v. Connecticut, 401 U.S. 371 (1971).....	46
Bonnett v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952).....	15
Bryan v. Itasca County, 426 U.S. 373 (1976).....	24,29,30,37
Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160 (1980)...	23
City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972).....	4
Cornfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230).....	44
Douglas v. California, 372 U.S. 353 (1963).....	43
Felix v. Patrick, 145 U.S. 317 (1892).....	20
Fisher v. District Court, 424 U.S. 382 (1976).....	37
Gourneau v. Smith, 207 N.W. 2d 256 (N.D. 1973).....	15

Griffin v. Illinois, 351 U.S. 12 (1956)..... 44

In re Whiteshield, 124 N.W. 2d 694 (N.D. 1963)..... 14

Kennerly v. District Court, 400 U.S. 423 (1971)..... 36,37,39

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 44,46

Little v. Streater, 452 U.S. 1 (1981)..... 46

Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576 (N.D. Ill. 1936)..... 41

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973)..... 24,37

McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974)..... 22

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976)..... 24

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)..... 20

Nelson v. DuBois, 232 N.W. 2d 54 (N.D. 1975)..... 16

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968)..... 24

Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966)..... 22,38

Ramah Navajo School Bd. of New Mexico Bureau of Revenue, 102 S.Ct. 3394 (1982)..... 23

Red Hawk v. Joines, 129 Or. 620, 278 P 572 (1929)..... 22

Rolette County v. Eltogbi, 221 N.W. 2d 645 (N.D. 1974)..... 15

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)..... 45

United States v. Candelaria, 271 U.S. 432 (1926)..... 20,21,23

United States v. McBratney, 104 U.S. 621 (1881)..... 19

United States v. Sandoval, 231 U.S. 28 (1913)..... 21

Vermillion v. Spotted Elk, 85 N.W. 2d 432 (N.D. 1957)..... 14

Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965)..... 36

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)..31,32,41,42

White Eagle v. Dorgan, 209 N.W. 2d 621 (N.D. 1973)..... 15

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)..... 24

Whiting v. Hoffine, 294 N.W. 2d 921 (S.D. 1980)..... 21

Williams v. Lee, 358 U.S.
217 (1959) 14,15,22,36

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832)..17,18,19,20,22

CONSTITUTION, STATUTES
AND REGULATIONS:

Act of Feb. 22, 1889,
§ 4, 25 Stat. 676 12

Act of March 3, 1891,
26 Stat. 1032..... 4

Act of August 15, 1953,
67 Stat. 588, codified in
part at 18 U.S.C. § 1162
and 28 U.S.C. § 1360..... Passim

United States Constitution,
Amendment XIV.....40,47

25 C.F.R. §§ 11.1(a),
11.22 (1982)..... 9

18 U.S.C. § 1162 7,27

25 U.S.C. § 1321-26..... 13,16,28

25 U.S.C. § 476, Indian
Reorganization Act 4

28 U.S.C. § 1360.....7,27

42 U.S.C. § 1981..... 40,47

Ft. Berthold Tribal C.
ch. II § 1(a)..... 9

N.D. Const. art I § 9..... 44

N.D. Const. art XVI § 203..... 11,13,29

N.D. Cent. C. § 10-19-09
to -11 8

N.D. Cent. C. § 27-19-01..11,12,13,16,29

N.D.R. Civ. P. 4(a) & (b)
§ 54-01-18..... 8

MISCELLANEOUS

F. Cohen, Handbook of Federal
Indian Law (1982 ed.).....9,18,19,22,24

Currie and Schreter,
Unconstitutional Discrimination
in the Conflict of Laws: Privi-
leges and Immunities, 69 Yale
L.J. 1323 (1960)..... 44

Goldberg, Public Law 280: The
Limits of State Jurisdiction
Over Reservation Indians,
22 U.C.L.A. L.Rev. 535 (1975)..... 30

Hearings on H.R. 1063 before
Sub-Committee on Indian Affairs,
83d Cong., 1st Sess. (June 29,
1953)..... 35,36

Hearing on H.R. 15419
and Related Bills Before the
Subcommittee on Indian Affairs
of the House Committee on
Interior & Insular Affairs,
90th Cong., 2d Sess. 25
(1968)..... 37

H.R. Rep. No. 848, 83rd
Cong., 1st Sess. (1953).....33,34

S.Rep. No. 699, 83rd Cong.,
1st Sess. (1953)..... 35

S.Rep. No. 90-721, 90th Cong.,
1st Sess. 32 (1968)..... 37

114 Cong. Rec. 9560, 9596,
9615 (1968)..... 38

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF OF TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS AS AMICUS CURIAE

Pursuant to Rule 36.3, the Turtle Mountain Band of Chippewa Indians moves the Court for leave to file the attached brief amicus curiae in support of petitioner in the above-captioned case. Amicus requested the parties to consent to the filing of this brief. Petitioner Three Affiliated Tribes has consented

as has Respondent Schmit, Smith & Rush. Respondent Wold Engineering has refused to consent. (Consents filed).

Amicus is a federally-recognized Indian tribe whose reservation is located in Rolette County, North Dakota. Amicus has a great interest in the case, since if the decision below is affirmed, individual Indian plaintiffs and tribal plaintiffs will be deprived of access to state courts. As a Tribe whose reservation is located in North Dakota, amicus has a direct interest in its own access to state court as well as the access of its members.

Amicus submits the attached brief in order to assist the Court in recognizing that the decision of the North Dakota Supreme Court is neither authorized nor required by federal law

and that it denies Indian plaintiffs due process of law and equal protection of the laws. The immediate parties are likely not to address specific points which amicus discusses and therefore amicus requests that its motion be granted.

Respectfully submitted,

Kim Jerome Gottschalk*
Richard B. Collins
Native American
Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Turtle
Mountain Band of
Chippewa Indians,
Amicus Curiae

*Counsel of Record

QUESTIONS PRESENTED

1. Does Public Law 83-280 or any other federal law authorize or require North Dakota to deny its courts jurisdiction over civil actions arising in Indian country by Indians or tribes against non-Indian residents of the State?

2. Does North Dakota's attempt to deny its court jurisdiction over civil actions arising in Indian country by Indians or tribes against non-Indian residents of the State violate 42 U.S.C. § 1981 or the fourteenth amendment?

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C. and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

AMICUS BRIEF OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

INTEREST OF AMICUS

Amicus is a federally-recognized Tribe whose reservation is located in Rolette County, North Dakota. Amicus has an interest in the case, since if the decision below is affirmed, individual Indian and tribal plaintiffs will be deprived of access to state

courts. As a Tribe whose reservation is located in North Dakota, amicus has a direct interest in its own access to state court as well as the access of its members.

Amicus submits the attached brief to assist the Court in recognizing that the decision below is neither authorized nor required by federal law and that it denies Indian plaintiffs due process of law and equal protection of the laws.

STATUTES INVOLVED

The applicable federal and North Dakota laws are set out in the Appendix to petitioner's brief.

STATEMENT OF THE CASE

This case concerns the Fort Berthold Indian Reservation in North Dakota, set aside for the Three Affiliated Tribes (Arikara, Mandan, and Gros

Ventre) by the Act of March 3, 1891 26 Stat. 1032. See City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972). The Reservation consists of a rectangular tract in the northwest quarter of the State, bisected by the Missouri River. Id. The Three Affiliated Tribes are organized under a constitution approved by the Secretary of the Interior under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

In 1974, respondent Wold Engineering, P.C., contracted with the Tribes to design and construct a water intake system. The system was designed to supply domestic water to the Four Bears Community, which includes the Tribal Administration Building and the Four Bears Motel, all situated within the

Fort Berthold Reservation. Pet. 4a. Wold is a professional corporation chartered under North Dakota law and owned by non-Indians. Its principal place of business is at Bottineau, North Dakota, located outside the Fort Berthold Reservation. Wold subcontracted part of the work to the repsondent Schmidt, Smith & Rush. Pet. 6a-7a.

Wold and Schmidt completed construction in July 1977. But during the winter of 1977-78, the water system froze and became inoperable. Efforts to adjust the dispute failed, and in April 1980 the Tribes filed a civil action in the North Dakota District Court for Ward County. The Tribes' action sought damages based on negligent design and breach of contract.

Wold was duly served, appeared and filed an answer. Trial of the action began on January 12, 1982, at which time Wold moved to dismiss on the ground that the action arose in Indian country and the State court had no jurisdiction. The trial court granted Wold's motion, and the Tribes appealed. Pet. 4a.

The North Dakota Supreme Court affirmed and issued an opinion. The immediate basis for its decision was failure of the Fort Berthold Indians to comply with a state statute, N.D. Cent. C § 27-19-01, which requires Indian consent to state jurisdiction on an Indian reservation. The statute was based on art. XVI § 203 of the North Dakota Constitution. But these provisions in turn depend upon the scope of federal Public Law 83-280, the Act of Aug. 15, 1953, 67 Stat. 588,

codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, and commonly called Public Law 280. The basic federal issue in this case is whether Public Law 280 authorizes or requires the decision of the court below and the state laws upon which it was based. This issue was raised and argued in both the state trial court and in the state supreme court, as the latter court's opinion shows. We discuss the relation of the state laws to Public Law 280 in the first part of our argument infra. The Tribes also contended in the court below that the State's action violates the fourteenth amendment; this argument was also rejected. Pet. 8a - 10a.

Under North Dakota law in effect when this action was filed (and today), there were four separate bases for

state court jurisdiction over this action. First, defendant Wold was a state-chartered corporation. Such corporations may be sued in North Dakota by service upon their resident registered agents. N.D. Cent. C. §§ 10-19-09 to -11. Second, Wold's principal place of business was in North Dakota, making it a resident for jurisdiction purposes. State residents may be sued in North Dakota courts. Id. § 54-01-18; N.D.R. Civ. P. 4(a), (b). Third, Wold was served with process in North Dakota. The State follows the usual Anglo-American rule that service is enough to acquire jurisdiction. N.D.R. Civ. P. 4(b). Fourth, the causes of action alleged in the complaint arose within North Dakota. This alone would normally be a sufficient basis for state court

jurisdiction under the State's "long arm" rule. Id. The court below implicitly determined that all of these jurisdictional bases were defeated by the state laws (mistakenly viewed as authorized or required by federal law) cited in the paragraph above, because the causes of action arose in Indian country. Even Wold's off-reservation residence was disregarded as a basis for jurisdiction.

When this action was filed, the tribal court lacked jurisdiction over civil actions against non-Indian defendants except by consent.[1/]

1/ Ft. Berthold Tribal C. ch. II § 1(a). The provision was essentially identical to the analogous provisions in the Code of Federal Regulations governing Courts of Indian Offenses set up by the Bureau of Indian Affairs. 25 C.F.R. §§ 11.1(a), 11.22 (1982). See, F. Cohen, Handbook of Federal Indian Law 333-35 (1982 ed.). In October 1982,
(continued on page 10)

SUMMARY OF ARGUMENT

The decision below was contrary to established federal law and was based on a misconstruction of federal P.L. 280. Additionally, for state law to deprive Indians and Indian tribes of access to state courts in the circumstances presented in this case, deprives them of due process and equal protection of the law.

ARGUMENT

I. FEDERAL LAW DOES NOT AUTHORIZE OR REQUIRE NORTH DAKOTA TO DENY ITS COURTS JURISDICTION OVER CIVIL ACTIONS ARISING IN INDIAN COUNTRY BY INDIANS OR TRIBES AGAINST NON-INDIAN RESIDENTS OF THE STATE.

1/ (continued from page 9) after the decision below, the Tribes amended their laws to extend civil jurisdiction over actions against non-Indians regardless of consent. The amendment was approved by the Secretary of the Interior.

A. The Decision Below Was Based on Federal Law.

As pointed out in our Statement, the North Dakota Supreme Court based its decision on a state statute, N.D. Cent. C. § 27-19-01, passed pursuant to art. XVI § 203 of the North Dakota Constitution. But the text and history of both provisions, and the state court's interpretation of them, depend on the view that a federal statute, Public Law 280, compelled or at least authorized the ruling below.

Section 203 of the North Dakota Constitution was part of the State's original constitution of 1889. It requires that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Pet. 6a. This

provision was required by Section 4 of the Enabling Act for North Dakota (and other States). Act of Feb. 22, 1889, § 4, 25 Stat. 676. The federal statute also required that the State's constitutional limitation not be repealed without the consent of Congress.

In 1963, the North Dakota legislature enacted N.D. Cent. C. ch. 27-19, including § 27-19-01, which "permits" the State's courts to assume jurisdiction over "all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner" specified in the statute. The statute's terms state that such

exercise of state court jurisdiction would be "[i]n accordance with...Public Law 280" and § 203 of the state constitution, and the statute's terms track those of Public Law 280.[2/] See also Part C infra.

In its opinion below the North Dakota Supreme Court said that the 1958 amendment to § 203 of the state constitution was made "[u]nder the authority of Public Law 280." Pet. 6a. The court used the same phrase to describe the enactment of N.D. Cent. C. § 27-19-01. Pet. 7a. The court quoted with approval from an earlier opinion in which it said that the state courts "are not at liberty to

---

2/ In 1968 Congress amended Public Law 280. See 25 U.S.C. §§ 1321-1326. The 1968 statute added a requirement for tribal consent to state assumptions or jurisdiction. See Part D infra.

exercise jurisdiction [on Indian reservations]," citing this Court's decision in Williams v. Lee, 358 U.S. 217 (1959). Pet. 8a. The court concluded its opinion by stating that "the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted." Pet. 10a. The court's first opinion construing this statute used the same reasoning. In re Whiteshield, 124 N.W. 2d 694 (N.D. 1963).[3]

3/ Prior North Dakota law seemed to show that the State has no policy against jurisdiction in the instant case independent of the authority of Public Law 280. In Vermillion v. Spotted Elk, 85 N.W. 2d 432 (N.D. 1957), the court sustained state court jurisdiction over an Indian country tort action against an Indian defendant. That decision
(footnote continued on page 15)

3/ (continued from page 14)

was plainly inconsistent with this Court's subsequent decision in Williams v. Lee, 358 U.S. 217 (1959). The state court so recognized in Gourneau v. Smith, 207 N.W. 2d 256 (N.D. 1973), repudiating the Vermillion holding. But the Vermillion court had favorably relied on Bonnett v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952), in which the Montana court had sustained state court jurisdiction over an Indian country action by an Indian against a non-Indian. 85 N.W. 2d at 437. In White Eagle v. Dorgan, 209 N.W. 2d 621 (N.D. 1973), the court decided the merits of an Indian country action by reservation Indians against non-Indians, although no challenge to jurisdiction was made. And in Rolette County v. Eltogbi, 221 N.W. 2d 645 (N.D. 1974), the court sustained state court jurisdiction over a child support action on behalf of reservation Indians against a non-Indian residing outside Indian country on the grounds that "Indians have the right to sue non-Indians in State courts." Id. at 648 (alternative holding). The opinion below in the instant case purported to distinguish Eltogbi as an off-reservation case. Pet. 7a n. 1. However, it is hard to see why the off-reservation residence of the defendant there was different from that of Wold here.

Another demonstration that the State was attempting to follow Public Law 280 derives from the history of the individual Indian consent provision in the 1963 state statute. As originally enacted, the statute allowed Indian consent to state court jurisdiction either by tribal majority vote (petition or referendum) or by individual consent in writing. See N.D. Cent. C. §§ 27-19-02. But in Nelson v. Dubois, 232 N.W. 2d 53 (N.D. 1975), the court held the individual consent provision to be invalid under the 1968 amendment to Public Law 280. The latter act provides for tribal but not individual consent. 25 U.S.C. §§ 1322, 1326. Plainly, the North Dakota court viewed the 1963 state statute as dependent on Public Law 280.

Therefore, the decision below was based on the view that Public Law 280 authorized or required North Dakota to deny jurisdiction over this action. We shall show in the following sections that the State's construction of Public Law 280 was erroneous and that no federal law required or authorized the state to deny its courts jurisdiction over this action. Although the state courts relied on Public Law 280, a review of this court's general decisions on Indian country jurisdiction will place Public Law 280 in perspective.

B. This Court's Decisions on Indian Country Jurisdiction Do Not Support The Decision Below.

In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court held invalid Georgia's attempt to punish

two non-Indian missionaries residing in Cherokee country in violation of state law. The Court held that the Constitution delegated from the people to the federal government paramount legislative authority over relations with the Indian tribes. The Court construed the treaties between the Cherokees and the United States, and the federal statutes governing Indian affairs, to have reserved self-government to the Cherokees within their retained territory, subject only to federal treaties and laws. Under this scheme, the Court concluded that "the laws of Georgia can have no force" in Cherokee country. Id. at 561. See F. Cohen, Handbook of Federal Indian Law 259-61 (1982 ed.).

Since Worcester, the Court and Congress have adhered to the Worcester

holding on the constitutional power of the federal government, and Worcester's recognition of retained tribal sovereignty has been applied to all Indian reservations except when altered by a governing act of Congress. See Cohen, supra, at 261-64, 367-70. But federal law governing non-Indians in Indian country has changed since 1832. See Cohen at 261-62, 264-66. Cases came to this court from Indian country in which the only parties directly concerned were non-Indians. In United States v. McBratney, 104 U.S. 621 (1882), the Court held that state courts had jurisdiction to try a white man accused of murdering a white victim in Indian country, and the federal courts lacked jurisdiction. Other decisions sustained state civil jurisdiction over non-

Indians in Indian country. E.g., Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) (which, like Worcester, involved missionaries to the Indians). See Cohen at 266.

Other cases came to the Court in which Indians had sued non-Indians in state courts. In Felix v. Patrick, 145 U.S. 317, 332 (1892), the Court rejected a response to the defense of laches by noting that a state court would have had jurisdiction over an action by Indians against non-Indians, although the case does not seem to have arisen in Indian country. In United States v. Candelaria, 271 U.S. 432 (1926), the Court sustained a plea of res judicata based on a prior case in which the Pueblo of Laguna, represented by federal attorneys, had sued non-

Indian defendants in the territorial and state courts of New Mexico. The case had involved a dispute over title to land within the boundaries of the Pueblo's territory.[4/] The Court expressly decided that "the state court had jurisdiction to entertain the suit and to proceed to judgment or decree." Id. at 444. Candelaria is squarely at odds with the decision below in this case. A number of state court decisions have also sustained state court jurisdiction over actions by Indians against non-Indians that arose in Indian country. See, e.g., Whiting v. Hoffine, 294 N.W. 2d 921,

4/ In United States v. Sandoval, 231 U.S. (1913), the Court held that the territory of a New Mexico Pueblo tribe was Indian country.

923-24 (S.D. 1980); McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 317 (1952); Red Hawk v. Joines, 129 Or. 620, 278 P.2d 572 (1929). See also, Cohen, supra at 355.

In Williams v. Lee, 358 U.S. 217 (1959), a non-Indian merchant sued an Indian couple in an Arizona state court to enforce an alleged debt. The defendants resided on the Navajo reservation, and the transactions at issue occurred there. This court relied on Worcester v. Georgia to hold that since the Navajo Court of Indian Offenses had jurisdiction, its jurisdiction was exclusive of that of the Arizona courts. But the court acknowledged that Indian country jurisdiction had changed since Worcester was decided. 358 U.S. at

219. In support of this observation, the Court cited with approval United States v. Candelaria, supra, and other cases sustaining state court jurisdiction over non-Indians in Indian country. 358 U.S. at 219-20. The Court concluded that "Absent governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id. at 220.

In many later cases, the Court has reviewed the merits of state court actions by Indians or tribes against non-Indian state officials based on transactions or events in Indian country. Ramah Navajo School Bd. v. New Mexico Bureau of Revenue, 102 S.Ct. 3394 (1982); Central Machinery Co. v. Arizona Tax

Comm'n., 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Bryan v. Itasca County 426 U.S. 373 (1976) (municipal corporation); Moe v. Salish & Kootenai Tribes 425 U.S. 463 (1976); McClanahan v. Arizona Tax Comm'n., 411 U.S. 164 (1973). Cf., Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968). These decisions establish two general rules. Indian defendants in Indian country are not subject to state jurisdiction unless Congress authorizes it, but non-Indian defendants in Indian country are subject to state jurisdiction unless a federal statute or treaty preempts state jurisdiction or state jurisdiction would interfere with the Indians "right to make their own laws and be ruled by them." See Cohen at 349-57.

The court below did not rely on infringement of tribal self-government to sustain its decision, nor could it. The Tribe directly consented to state court jurisdiction by filing this action. Rather, the court invoked Public Law 280. In the next section, we shall show that P.L. 280 does not support the decision below.

C. Public Law 280 Does Not Support The Decision Below

1. By Its Terms, Public Law 280 Is Confined to Assumption of State Jurisdiction; It Does Not Authorize Withdrawal of Pre-Existing Jurisdiction

As set out in previous sections, federal law prior to the passage of Public Law 280 in 1953 did not authorize or require a State to deny its courts jurisdiction over civil actions arising in Indian country

against non-Indian residents of the State. Hence the decision below was based on the proposition that Public Law 280 decreased state jurisdiction in Indian country, at least to the extent of authorizing North Dakota to withdraw state court jurisdiction over actions such as this one. We shall show that North Dakota's action was based on an erroneous construction of Public Law 280.

The purpose of Public Law 280 was to increase state court jurisdiction in some areas of Indian country, not to decrease it. Sections 1-4 of the Act imposed partial criminal and civil jurisdiction on the courts of five states (not including North Dakota) over Indian country therein. The statutory words are, the States "shall have

jurisdiction" over certain offenses and civil causes of action. 67 Stat. 588. See 18 U.S.C. § 1162, 28 U.S.C. § 1360. Sections 6 and 7 of the Act authorized any other State to assume the same jurisdiction imposed on the five named States. These sections use the words "assumption of civil and criminal jurisdiction," "assumption of jurisdiction," and "assume jurisdiction." More directly on point, Section 7 begins:

> The consent of the United States is hereby given to any other State not having jurisdiction ...(emphasis added).

These words cannot reasonably be read to authorize (much less compel) a State to withdraw Indian country jurisdiction over non-Indians that the State had prior to the statute.

The amended version of Public Law 280 adopted in 1968 is equally clear. The section on civil causes of action, 25 U.S.C. § 1322, begins:

> § 1322. Assumption by State of Civil Jurisdiction.
>
> (a) Consent of United States; force and effect of civil laws
>
> The consent of the United States is hereby given to any States not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof, which would be affected by such assumption, such measure of jurisdiction over any and all such civil causes of action arising within such Indian country.

The clear language of the statute again authorizes only additions to state jurisdiction. [5/]

5/ The people of North Dakota apparently recognized that Public Law

(continued on page 29)

2. The Legislative History and This Court's Decisions Show That Public Law 280 Was Concerned Only With the Assumption of Jurisdiction, Not with Withdrawal of Pre-Existing Jurisdiction.

This Court has aptly characterized the legislative history of Public Law 280 as "sparse". Bryan v. Itasca County, 426 U.S. 373, 379 (1976). This is

---

5/ (continued on page 28) 280 pertained to assumption of jurisdiction. This is evident from the language of the proviso added to Section 203 of their Constitution in 1958:

> The legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress ..." Article XIII, § 1, N.D. Const.

N.D.C.C. § 27-19-01 provides that "In accordance with the provisions of Public Law 280...jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this section." (Emphasis added). See Sec. A, supra.

especially true of the provisions dealing with civil jurisdiction, since the primary concern of Congress in enacting Public Law 280 "was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." Id. citing Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L.Rev. 535, 541-42 (1975).

In Bryan v. Itasca County, supra the Court held that Public Law 280 did not extend general state civil regulatory authority to Indian reservations. Rather, the Court stated that the civil part of Public Law 280 should be read "as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects

save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians." Id. at 391. (emphasis added). Thus, other than the conferral of jurisdiction intended by Public Law 280, existing law on state jurisdiction was left undisturbed.

In Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) the Court upheld Washington's piecemeal extension of jurisdiction under Public Law 280. Washington had not amended its constitution to eliminate the disclaimer of jurisdiction required by its Enabling Act (the same Act by which North Dakota was authorized to become a State). This Court observed that "...the circumstances surrounding the passage of Public Law 280 in themselves

fully bear out the State's general thesis that Public Law 280 was intended to facilitate not to impede the transfer of jurisdictional responsibility to the States." 439 U.S. at 490. (Emphasis added). The Courth held that less than full assumptions of jurisdiction were allowed by Public Law 280 in part because a requirement that a State can accept all or none of the proffered jurisdiction would impede rather than facilitate desired transfers. 439 U.S. at 497. This view leaves no room for an authorization to withdraw jurisdiction.

The legislative history is replete with references indicating that Congress was concerned solely with the assumption of jurisdiction by the States. The original bill dealt only with the extension of jurisdiction to California,

but as H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953) indicates, the bill was amended to

> "(1) confer as of date of enactment, civil and criminal jurisdiction on the States of California, Minnesota, Nebraska, Oregon, Wisconsin, (Sec. 4, emphasis added).
>
> * * *
>
> (2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws. (Sec. 6, emphasis added).
>
> * * *
>
> (3) give consent to all other States to acquire jurisdiction over criminal offenses or civil causes at such time and in such manner as by affirmative legislative action such States may elect to acquire jurisdiction. (Sec. 7, emphasis added).

Id. at 6-7.

In a letter included in the same report, the Assistant Secretary of the Interior reported on the views of the States and Indian groups on the question of the "transfer of civil and criminal jurisdiction over Indians on their reservations to the respective States." Id. at 7-8. (emphasis added). Those Indian tribes expressing opposition to the transfer were excepted from the automatic grant of jurisdiction of the Act. The Warm Springs Tribe and the Colville and Yakima Tribes opposed the application of the Act to them because they feared inequitable treatment in state courts. Id. at 7-8. This fear is only relevant in those cases when Indians are defendants in state courts, since Indians who have voluntarily chosen a state forum have waived any right to complain of inequi-

table treatment. S. Rep. No. 699, 83rd Cong., 1st Sess., (1953) also speaks of the purpose of the bill as being "to confer" jurisdiction.

In Hearings on H.R. 1063 before the Subcommittee on Indian Affairs, 83rd Cong., 1st Sess. (June 29, 1953) (unpublished but lodged with the Clerk of this Court), the bill (prior to amendment to include more states) is described as providing for an "extension" of jurisdiction. Mr. Sellery, Chief Counsel, Bureau of Indian Affairs, testified on H.R. 1063 prior to its expansion to cover other States:

> Consequently, the Department believes there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State, and the Indians of California have also reached a stage that makes desirable the extension

> of State civil jurisdiction to the Indian country in that State.

Id. at 2-3. Repeated references are made to those Indian groups opposing the "cession" of jurisdiction to the States or being "subjected" to state jurisdiction Id. at 13, 17, 22. Once again, these concerns are understandable only in the context of Indians being sued as defendants. See also Id. passim (July 15, 1953) (hearing on committee amendments extending scope).

Other decisions of this Court describe Public Law 280 as designed to accomplish a transfer of jurisdiction to and assumption of jurisdiction by the States. See, e.g., Williams v. Lee, supra, 358 U.S. at 222-223; Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685, 687 n. 3 (1965); Kennerly

v. District Court, supra, 400 U.S. at 427, 428 (1971); McClanahan v. Arizona Tax Comm'n., supra, 411 U.S. at 177-78; Fisher v. District Court, 424 U.S. 382 (1976); Bryan v. Itasca County, 426 U.S. 463 (1979).

The same view is reflected in the legislative history of the 1968 Act that amended Public Law 280. See, e.g, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong. 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are

not "subjected" to state courts before they are ready); id. at 27, 32, 38, 91 (discussing Paiz v. Hughes, supra, in which an Indian sued a non-Indian), 104, 108-109, 115-16, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968); id. at 5520 (Presidential message).

The legislative history and this Court's decisions foreclose an interpretation of Public Law 280 that would allow for withdrawal of pre-existing jurisdiction.

D. The State Statute Did Not Comply With Public Law 280

A distinct reason that Public Law 280 did not authorize passage of the state statute upon which the court below relied is that the state statute did not comply with the requirements of Public Law 280. As described

above, sections 6 and 7 of Public Law 280 authorized States not named in sections 1-4 to "assume" jurisdiction over Indian country by affirmative state action. The operative words in sections 6 and 7 are "assumptions of jurisdiction" and "assume jurisdiction." But N.D. Cent. C. ch. 27-19 did not assume any jurisdiction. While it agreed to accept jurisdiction upon Indian consent, no tribe in fact consented. No jurisdiction was in fact assumed, so Public Law 280 has never applied. For this reason, reliance on it by the court below was misplaced. See Kennerly v. District Court, 400 U.S. 423 (1971).

II. NORTH DAKOTA'S DENIAL OF JURISDICTION OVER THIS ACTION VIOLATES 42 U.S.C. § 1981 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Argument I of this brief is based on the premise that the North Dakota laws at issue, and the decisions below, were intended to be passed under the authority of Public Law 280. See Part IA supra. Assuming the contrary, that North Dakota purported to act on independent state authority, we shall show in this part that its action is invalid under governing federal law.

A. The State's Action Violates 42 U.S.C. § 1981

42 U.S.C. § 1981 provides in relevant part that "All persons within the jurisdiction of the United States shall have the same right in every

State...to sue...as is enjoyed by white citizens...." The plain language of the statute is dispositive of the case here.[6/] Cf. Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576 (N.D. Ill. 1936).

B. The State's Action Violates The Fourteenth Amendment

1. North Dakota's Rule Denies Indians and Tribes Equal Protection

The court below sustained the North Dakota laws at issue against an equal protection attack by relying on this Court's holding in Washington v. Yakima Indian Nation, 439 U.S. 463

6/ That this point was not raised below is not relevant. It is a pure question of law and may be raised for the first time on appeal. Alaska Chapter Associated General Contr. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

(1979). Pet. 8a - 10a. This reliance is misplaced. In Yakima, this Court sustained a Washington law taking jurisdiction under Public Law 280. But Washington's law was within the scope of Public Law 280 and authorized by it, as the Court determined. Id. at 500. As set out above, North Dakota's denial of state court jurisdiction over non-Indians in Indian country is not authorized by Public Law 280. Hence, Yakima is not authority to sustain North Dakota's law.

Moreover, the Court's opinion in Yakima raises serious doubts about North Dakota's action. The Yakima court relied on the well-established rule that federal legislation treating tribal Indians as a distinct

class is justified by "the unique legal status of Indian tribes under federal law." 439 U.S. at 501. The same jurisdiction sustains similar state laws when they are authorized by federal law. Id. But North Dakota's denial of state court jurisdiction over non-Indians in Indian country, having no federal backing, must be judged by a stricter standard. "States do not enjoy this same unique relationship with Indians." Id.

North Dakota's rule denies access to its courts to a class of reservation Indians and tribal plaintiffs suing non-Indian residents of the State when the cause of action arises in Indian country. Access to courts is an important right, one that this Court has recognized as fundamental in some contexts. See Douglas v. California, 372 U.S. 353

(1963); Griffin v. Illinois, 351 U.S. 12 (1956). See also Cornfield v. Coryell, 6 F.Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230) quoted in Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371, 384 (1978) (access to state courts among the fundamental rights guaranteed to non-resident citizens) Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges & Immunities, 69 Yale L.J. 1323, 1379-89 (1960). 7/

At a minimum, the State's classification must bear a rational relation to a legitimate state purpose. Logan v. Zimmerman Brush Co., 455 U.S.

7/ North Dakota law is consistent, because the North Dakota constitution guarantees equal access to the State's courts. N.D. Const. art. I § 9.

422, 439 (1982); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). No state purpose to justify North Dakota's rule at issue here appears in the opinion below or elsewhere in the record of this case. Rather, North Dakota's action was taken in misguided reliance on Public Law 280. See Part I.A supra. Shorn of that support, the State law has no rational basis and denies petitioner and others similarly situated the equal protection of the State's laws.

2. North Dakota's Rule Denies Indians and Tribes Due Process of Law

A State law denying access to its courts denies due process of law unless justified by "the magnitude of the governmental interests involved."

Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). See also Little v. Streater, 452 U.S. 1 (1981); Boddie v. Connecticut, 401 U.S. 371 (1971). No significant interest of the State is identified in the opinion below. Again, the State acted in mistaken reliance on the authority of Public Law 280. Thus the State's action denies petitioner and others similarly situated due process of law.

CONCLUSION

For the reasons stated, this Court should reverse the decision below, declare that no federal law authorized or required North Dakota to deny its courts jurisdiction over Indian country causes of action by Indians or tribes against non-Indian

state residents, declare that the State's action violated Public Law 280, 42 U.S.C. § 1981 or violated the Fourteenth Amendment, and remand for futher proceedings.

Respectfully submitted,

Kim Jerome Gottschalk*
Richard B. Collins
Native American
Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae

*Counsel of Record

July 1983

(THIS PAGE INTENTIONALLY LEFT BLANK)